(3)

IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 295 of 2001.

APPELLANT: (IN JAIL) — RAJKUMAR, S/o Rajendra Prasad Khairwar, aged about 28 years, r/o Village Dharmi, Police station Ramchandrapur, Dist. Surguja (Chhattisgarh)

VERSUS

RESPONDENT: — STATE OF CHHATTISGARH, Through the police station Ramchandra pur Dist. Surguja (Chhattisgarh)

CONVICTION:	SENTENCE
U/S 302 OF I.P.C.	Life Imprisonment

MEMO OF CRIMINAL APPEAL UNDER SECTION 374(2) OF THE CODE OF CRIMINAL PROCEDURE, 1973.

3010 ..2021 ..... Advocate

HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

Criminal Appeal No. 295 OF 2001

Rajkumar

Vs.

State of C.G..

JUDGEMENT FOR CONSIDERATION

Sd/-
DHIRENDRA MISHRA
Judge

HON'BLE SHRI FAKHRUDDIN J.

I agree

Sd/-
Fakhruddin
Judge

POST FOR JUDGMENT ON 23 AUGUST 2006

Sd/-
Dhirendra Mishra
Judge

(20)

HIGH COURT OF CHHATTISGARH AT BILASPUR

DIVISION BENCH : HON. SHRI JUSTICE FAKHRUDDIN AND HON. SHRI JUSTICE DHIRENDRA MISHRA

CRIMINAL APPEAL NO. 295 OF 2001

RAJKUMAR — APPELLANT

VERSUS

STATE OF C.G. — RESPONDENT

Shri Rajesh Pandey counsel for the appellant.
Shri Akhil Mishra PL for the respondent/State.

JUDGMENT

(Delivered on 23-8-2006)

The appellant has preferred this appeal against the impugned judgment dated 14.3.2001 passed by learned Sessions Judge, Ambikapur (Sarguja) in Sessions Trial No. 169/1999 whereby he has been convicted under section 302 of the IPC for causing the death of Phulmatia and sentenced to undergo imprisonment for life.

2. Case of the prosecution in brief is that on 2.4.99 Devan Prasad (PW-6) lodged the First Information Report (Ex.P-6) in Police Station Ramchandrapur to the effect that his aunt Phulmatia had gone to take broken rice to the house of Nanhu Khairwar (P.W.4) in the last evening and when she was returning with her bullocks Nanhu Khairwar heard her shouts that Rajkumar was assaulting her with axe. On hearing the shouts Nanhu Khairwar went there running and saw that accused Rajkumar assaulted Phulmatia on her left hand above the shoulder. Thereafter, when Phulmatia started running the accused chased her and gave the second blow over her neck and as a result of the injuries sustained by her she died. This incident was narrated to him by Suneshwar in the previous

night and thereupon he along with Suneshwar went near the dead body where Nanhu Khairwar and other villagers were also present. Nanhu Khairwar informed him and other villagers that Rajkumar killed his aunt Phulmatia with axe. He has further stated that there was some dispute between Rajkumar and his aunt pertaining to land and also sorcery.

3. After registering the case under Section 302 of the I.P.C. against the accused, the Investigating Officer left for the scene of occurrence. After conducting inquest (Ex.P-11) over the body of the deceased, the body was sent for autopsy to the Community Health Centre, Ramanujganj, where Dr. B.R.Sharma (P.W.-3) conducted the post mortem and submitted his report (Ex.P-4). Broken rice wrapped in a piece of saree, plain and blood stained soil were taken into possession from the place of incident vide Ex.P-14. On memorandum of the accused (Ex.P-15), weapon of offence, i.e. axe (Balua), blood stained Lungi and Shirt of the appellant were also taken into possession vide Ex.P-16. A sealed packet containing clothing of the deceased was seized vide seizure memo (Ex.P-17). Accused was arrested on 2-4-1999. All the seized articles being viscera, plain and blood stained soil, axe, clothing of the appellant as also that of the deceased were sent for chemical examination to Forensic Science Laboratory vide Ex.P-20. Those articles were also sent to the Serologist for confirmation of the blood group who submitted his report Ex.P-21. After completing the investigation, charge-sheet was filed in the Court of Judicial Magistrate First Class, Ramanujganj, who in turn committed the case to the Court of Sessions Judge for trial.

4. Learned Sessions Judge framed charge against the appellant under Section 302 of the I.P.C. The appellant however abjured the guilt.

5. The prosecution in order to establish the charges levelled against the appellant examined as many as 6 witnesses. Thereafter statement of the accused was also recorded under Section 313 of the Cr.P.C. in which he denied the circumstances appearing against him in the prosecution case.

6. In reply to question No.1, the appellant denied that Nanhu Khairwar (P.W.-4) recognises him and he pleaded ignorance and stated that he does not know the deceased. In reply to question No.25, the accused further stated that he had some land related dispute with Nanhu Khairwar and, therefore, he in league with the Sarpanch of the village had implicated him as his father had some election related dispute with the Sarpanch. He has stated that Nanhu Khairwar is a tout and he consumes liquor with the Sarpanch. He has stated that Nanhu Khairwar and Sarpanch both are touts and they keep implicating the villagers unnecessarily and thus he has not committed any crime and has been falsely implicated in the case. The appellant has examined himself in his defence as D.W.-1 under Section 315 of the Cr.P.C.

7. The trial Court after hearing the Public Prosecutor and the counsel for the appellant has convicted and sentenced the accused as mentioned above.

8. Homicidal death of Phulmatia is not in dispute. Even otherwise, from the perusal of the statement of Dr. B.R. Sharma (PW-3) who conducted the post mortem on the body of the deceased and also from the report (Ex.P-3) submitted by him mentioning the injuries noticed by him as described below, the homicidal death of Phulmatia is established:

(i) Incised wound 10 x 6 x 5 c.m. over the left shoulder.

(ii) Incised wound 6 x 4 x 3 c.m. over the right shoulder.

(iii) Incised wound over the back and neck extending from left angle of mandible to backward downward oblique up to near middle of right clavicle size 16 x 8 x 8 c.m. Brain material was coming out.

On internal examination the he noticed that the brain had started liquification and all the major arteries of the neck were cut. All the injuries were caused by hard and sharp edged weapon. Cause of death as opined by him is shock due to excessive hemorrhage from neck and directly cutting of spinal cord of neck.

9. The only question to be decided in this appeal is whether the prosecution has been able to establish the involvement of the accused/appellant in the crime in question?

10. Learned counsel for the appellant submitted that witness Nanhu Khairwar is a 70 years old man. From the site plan (Ex. P-9) prepared by the Investigating Officer on 2.4.99 it would be evident that the distance of the house of Nanhu Khairwar (PW-4) from the place of incident is shown as 800 meters and therefore, it was not possible for him to hear the shouts raised by Phulmatia and reach the place of incident immediately and witness the crime. It is argued that the conviction is based on the sole testimony of Nanhu Khairwar (PW-4) who admittedly had inimical relations with the accused as is evident from the statement of PW-6 Devan Prasad, the complainant who has admitted in the cross examination that there was

some dispute between the father of the accused and Nanhu Khairwar regarding a Mahua tree. Placing reliance on the judgment of the Supreme Court in the matter of **Lallu Manjhi and another Vs. State of Jharkhand** reported in **(2003) 2 SCC 401** learned counsel for the appellant submitted that PW-6 Devan Prasad is neither wholly reliable nor wholly unreliable and therefore, the Court below ought to have been circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of witness Nanhu Khairwar. Learned counsel further submitted that in the instant case the statement of this witness ought to have been discarded as in the diary statement Ex. D-1 he has not stated that he had seen the incident rather he stated that he saw the accused running from the place of incident. Learned counsel further relied upon the judgment of the Supreme Court in the matter of **Mohan Lal Vs. State of Rajsthan** reported in **AIR 1993 SC 2457** and contended that Nanhu Khairwar has been wrongly introduced as the eyewitness to the incident and in fact he had not seen the occurrence and in these circumstances the Court below ought to have extended the benefit of doubt to the accused.

11. On the other hand learned counsel for the respondent/State supported the impugned judgment of the trial Court.

12. Conviction of the appellant is based on the statement of PW-4 Nanhu Khairwar, the sole eyewitness to the incident. This witness has stated in his deposition that he knows the deceased and the accused. He has further stated that when deceased Phulmatia was returning from the house of *Bania* with broken rice, Rajkumar assaulted her with axe on her left hand above the shoulder and thereafter he again assaulted her on the

neck. At that time this witness was taking his cow to his house and when he heard three shouts raised by Phulmatia he went to the place of incident. He stated that accused Rajkumar assaulted Phulmatia with axe and thereafter went running towards the rivulet. The age of this witness has been assessed by the trial Court as 55 years. However, in the cross examination a suggestion was put to him that his age might be 70 years, he accepted the same. However, he has stated that he did not know the meaning of "seventy". This witness has denied that the rivulet is one and half *Koas* away from his field. He has stated that the distance of the rivulet was so much that shouts of call could be heard from there. In his further examination he has stated that the distance is about 150 ft. So far as the argument of the counsel for the appellant that PW-4 being 70 years of age could not have witnessed the incident, there is no evidence to show that this witness was not able to see properly as he has denied the suggestion to this effect. In site plan (Ex. P-9) prepared by the Investigating Officer the distance of the house of Nanhu Khairwar and the place of incident is shown to be 800 meters and according to the counsel for the appellant from such a distance the shouts raised by Phulmatia could not be heard by witness Nanhu Khairwar. However, if it is seen minutely the distance between the above two places appears to be 300 meters. Even otherwise learned counsel for the appellant submits that no suggestion has been put regarding the above distance. Subsequent site plan prepared by Halka Patwari, though not proved during trial, shows that the distance of the house of Nanahu Khairwar and the place of incident was 263 meters. Site plan prepared by the Investigating Officer is not a substantive piece of evidence and the eyewitness account given by a witness cannot be

disbelieved only on the basis of entries in the site plan as the same is hit by section 162 of the Code of Criminal Procedure.

13. Since there is no cross examination of the investigating officer with respect to the distance between the threshing field of Nanhu Khairwar and the place of the incidence, the eye witness account given by PW-4 in the site plan of Ex. P-9 cannot be disbelieved. Statement of PW-4 Nanhu Khairwar is corroborated by the statement of PW-6 Devan Prasad, complainant and the same is proved by First Information Report Ex. P-6. This witness has stated that he recognized the appellant and the diseased. He went near the rivulet with Someshwer where the dead body was lying. When he reached there the Sarpanch and other villagers told him that it was the body of his aunt. Nanhu Khairwar told him that Rajkumar killed his aunt. Thereafter he went to police station Ramchandrapur and lodged the report of the incident. He further stated in the cross examination that his aunt was going to her home after taking broken rise and bullocks. He has further stated that from the house of Nanhu Khairwar rivulet can be seen. He stated that Nanhu Khairwar takes liquor and on the date of incident also he had taken liquor in the meeting. He, however, denied that the Sarpanch asked him to name Rajkumar. He further stated that Nanhu Khairwar informed him that Rajkumar killed his aunt. Statement of PW-4 Nanhu Khairwar is corroborated by the statement of PW-6 Devan Prasad who has mentioned therein that Nanhu Khairwar witnessed the incident and described the injury inflected by the accused. The statement of above witnesses is further corroborated by the statement of PW-3 Dr. B.R. Sharma and the postmortem report in which corresponding injuries found on the body of the deceased have been

described. So far as the defence of the accused and his statement recorded under Section 315 of the Code of Criminal Procedure as DW-1 are concerned, we have already recorded in the foregoing paragraph that in reply to the question put to the accused under Section 313 of the Code of Criminal Procedure initially he stated that witness Nanhu Khairwar does not recognize him, however as a defence witness in paragraph-1 he has admitted that he is recognized Nanhu Khairwar and Ramjeet and he does not know name of wife of Kashinath. However, he has stated that he knows Phoolmatia who was resident of his village. The defence of the accused has been disbelieved by the Court below on the ground that the defence taken in his statement is not reflected in the cross examination and none of the witnesses examined by the prosecution has supported the statement of Rajkumar.

14. Thus considering the fact that name of the accused/appellant very much appears in the First Information Report lodged by PW-6 Devan Prasad and also the fact that incident was witnessed by PW-4 and that the defence has not been able to elicit anything in the cross examination of PW-4 Nanhu Khairwar or PW-6 Devan Prasad which makes their statement doubtful or unreliable, we are of the considered opinion that the trial court has not committed any illegality or infirmity in convicting and sentencing the appellant as mentioned above and accordingly the appeal is liable to be dismissed and the same is dismissed.

Sd/-
Fakhruddin
Judge

Sd/-
Dhirendra Mishra
Judge